No. 330

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

John P. Hooker,
petitioner,

v.

New York Life Insurance Company,
respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

Statement of matter involved.

Opinions of lower courts: The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, granting summary judgment in favor of the petitioner, appears in the transcript of record at pp. 69-78 (*same,* 66 F. Supp. 313). The majority opinion of the Circuit Court of Appeals for the Seventh Circuit, by Major, *C.J.*, reversing the judgment of the district court, appears at R. 92-101, the dissenting opinion of Minton, *C.J.*, at R. 102-103 (*same,* 161 F. 2d 852).

Nature of action: The respondent on June 3, 1938 issued a policy of insurance on the life of petitioner's son, George Kellogg Hooker, then 21 years of age, a student at the University of Virginia and a reservist in the United States Ma-

rine Corps. The policy was for $10,000, plus an additional indemnity of the same amount in case of death by accidental means. On May 19, 1943 the insured—then serving as a captain in the United States Marine Corps and stationed in New Zealand—met sudden death as the result of an accidental slide or fall over a 75-foot cliff. The accident occurred during the course of practice maneuvers in which the insured played the part of an enemy scout, was taken 'prisoner' and bolted his 'captors.' In attempting to make his 'escape,' the insured jumped over a hedge which obstructed his view of the abyss into which he slid or fell.

The respondent paid to the petitioner, the beneficiary, the face amount of the insurance policy, but declined to pay the double indemnity. To petitioner's complaint for the additional $10,000, the respondent filed an answer denying liability on the ground that the double indemnity provision of the policy excluded death resulting from "war or any act incident thereto" and that this exclusion was applicable to the death of the insured. (R. 6, 29.)

How the case was decided: On the complaint, answer, and uncontroverted affidavits filed by respondent stating the circumstances of insured's death, the respondent moved the court for a summary judgment. (R. 38.) The district court denied this motion; instead, granted summary judgment in favor of petitioner. (R. 78.) The circuit court of appeals, by two to one vote, declared that the death of the insured was "clearly an incident of war" and reversed the judgment of the district court. (R. 101.) The case was remanded to the district court to proceed in accordance with the views expressed in the prevailing opinion of the circuit court of appeals. (R. 104.)

Jurisdiction of this court.

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code (28 U.S.C.A., Sec. 347(a)) as amended February 13, 1925.

The judgment of the circuit court of appeals, reversing the judgment of the district court, was entered May 8, 1947. (R. 104.) A petition for rehearing, duly filed by the petitioner (R. 104), was denied June 10, 1947. (R. 105.)

Questions presented.

Federal jurisdiction in this case was based solely on diversity of citizenship (R. 2) and the matter to be decided was the proper application of the double indemnity provision of respondent's insurance policy—an Illinois contract —to the uncontested facts regarding the manner in which the insured met his death.

1. Did the majority of the circuit court of appeals—as demanded by *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, *Fidelity Union Trust Co.* v. *Field,* 311 U.S. 169, *Six Companies of California* v. *Joint Highway District No. 13,* 311 U.S. 180, *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487, and *Guaranty Trust Co. of New York* v. *York,* 326 U. S. 99—make adequate effort to determine how the Illinois court of last resort would decide the case, based on the applicable principles of Illinois law and the decisions of the courts of Illinois in analogous cases?

2. Did the majority of the circuit court of appeals give effect to the Illinois rules governing the proper construction of the insurance contract, *viz.*, that the contract is to be construed more strictly against the insurer, since the insurer chose the language, and that in case of

ambiguity the construction to be preferred is that which avoids forfeiture of the indemnity?

3. If the majority judges of the circuit court of appeals had been guided by the Illinois law rather than their own idea of what the law ought to be, would they not have accepted the decision of the Appellate Court of Illinois in *Mattes* v. *Merchants Reserve Life Insurance Co.*, 221 Ill. App. 648,, as determinative evidence that the Illinois court of last resort would decide the present case in favor of the petitioner?*

Reasons relied on for allowance of writ.

Certiorari should be allowed in this case to vitalize the profoundly important doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. It is not enough, we urge, that this court has announced the general principle that in cases coming into the federal courts only because of diversity of citizenship and involving only questions of local law it is the duty of the federal courts to ascertain and follow the local law. The general precept will retain vitality only if faithfully applied by all of the federal courts in the adjudication of actual controversies and if this court constantly exercises its supervisory authority to prevent departures from the rule.

The circuit court of appeals has in this case decided an important question of local law in a way probably in conflict with local decisions.

Inadequate consideration was given by the majority judges of the circuit court of appeals to the Illinois decisions regarding the proper construction of insurance con-

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* The Mattes case is reported only in abstract form, therefore the complete opinion of the court is set forth as an appendix to this petition, infra, p. 23. An application for certiorari was denied by the Supreme Court of Illinois.

tracts. It may fairly be said, we believe, that the majority judges of the court decided the case in accordance with their own ideas of what the law ought to be and made no serious attempt to determine how the Illinois court of last resort would decide the case, based on decisions of the Illinois courts in analogous cases and the general rules of Illinois law applicable to cases of this kind. The dissenting judge, by contrast, found in *Mattes* v. *Merchants Reserve Life Insurance Co.*, 221 Ill. App. 648, clear indication that the courts of Illinois would sustain liability in the present case. (R. 103.)

Review of this case by this court is called for, we submit, because it involves a question of public importance concerning the interrelations of the state and federal courts. (*West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 235, 85 L. ed. 139, 61 S. Ct. 179.)

Prayer.

The petitioner respectfully prays that a writ of certiorari be issued by this honorable court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court for its review a full and complete transcript of the record and proceedings in case No. 9170 on its docket, entitled *John P. Hooker, plaintiff-appellee,* v. *New York Life Insurance Company, defendant-appellant,* and that the judgment of the circuit court of appeals in said case may be reversed by this honorable court, and that petitioner may have such other relief in the premises as to this honorable court may seem just.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of district court and circuit court of appeals.

Opinion of the district court: R. 69-78, *same* 66 F. Supp. 313. Opinion of circuit court of appeals: R. 92-101, dissenting opinion: R. 102-103; *same* 161 F. 2d 852.

II.

Statement of the case.

The material facts with reference to the origin and history of the case, jurisdiction of this court, and the questions presented, have been stated in the foregoing petition.

On May 24, 1938 the insured, George Kellogg Hooker, applied for the insurance at Chicago, Illinois. (R. 24.) He stated in his application that he was a reservist in the United States Marine Corps (R. 24), and that in 1937 he had been examined for training by the Marine Corps medical staff. The policy was issued June 3, 1938 "in consideration of the application therefor and of the payment in advance of the sum of $315.20, the receipt of which is hereby acknowledged, constituting the first premium." (R. 5.)

On May 19, 1943 the insured was a Captain in the United States Marine Corps Reserve, Company "E," Third Tank Battalion, Third Marine Division. The 21st regiment of

Marines was engaged in practice maneuvers over an area of several square miles near Auckland, New Zealand. Company "E" of the Third Tank Battalion composed the 'defending force,' and Company "E" of the Second Battalion, 21st Marines, was the 'attacking enemy.' Captain Hooker, playing the role of a scout, was captured by the 'enemy' and turned over to a patrol of about six men to be escorted as a 'prisoner' to their command post. He called attention of his captors to a bulldozer on top of a hill and while their attention was thus diverted he made a dash for a nearby fence and hedge in an attempt to 'escape'. When he landed over the fence, he struck wet clay and slid or bounced over a 75-foot cliff. The brush completely concealed the cliff. Death followed within a few hours (R. 53-58).

The undisputed facts of the case were shown by a series of affidavits attached to respondent's motion for summary judgment. As stated in the petition, the district court denied respondent's motion and instead entered summary judgment in favor of the plaintiff. (R. 78-79)

III.

Specification of errors to be urged.

1. The circuit court of appeals erred in reversing the judgment of the district court.

2. The circuit court of appeals erred in directing the district court to proceed in accordance with the views expressed in the opinion of the court by Major, *C.J.*, wherein it was said:

> "We think there is no escape from the conclusion that the insured's death resulted from 'war or an act incident thereto.' • • • The circumstances surrounding the unfortunate accident which befell insured point

unerringly to the conclusion that he was engaged in 'an act incident to war.' * * * As we view the matter, his death was clearly an incident of war. The plain, unambiguous language of the exclusion clause as applied to the facts of the instant situation requires a reversal of the judgment." (R. 100-101.)

IV.

The circuit court of appeals failed to ascertain and apply the law of Illinois applicable to this case.

A.

The absence of an Illinois case construing exactly the same policy provisions in relation to substantially identical facts did not excuse the circuit court of appeals from undertaking to ascertain the applicable Illinois law from the decisions of the Illinois courts in analogous insurance cases, particularly the decision of the appellate court in *Mattes* v. *Merchants Reserve Life Insurance Co.*, 221 Ill. App. 648, appendix *infra*, p. 23.

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169, 177-178, 85 L. ed. 109, 61 S. Ct. 176:—Construction of state statute by Chancery Court of New Jersey in analogous cases held binding on federal courts. "An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."

Six Companies of California v. *Joint Highway District No.* 13, 311 U. S. 180, 188, 85 L. ed. 114, 61 S. Ct. 186:—Held that the circuit court of appeals (in 1940) erred in refusing to accept as controlling in indication of state law a decision rendered in 1919 by an intermediate appellate

court of California, not disapproved by the Supreme Court of California.

West v. *American Telephone & Telegraph* Co., 311 U. S. 223, 236-238, 85 L. ed. 139, 61 S. Ct. 179:—"A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts. See *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64; *Russell* v. *Todd,* 309 U. S. 280. Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

Stoner v. *New York Life Insurance Co.,* 311 U. S. 464, 467-469, 85 L. ed. 284, 61 S. Ct. 336:—On question whether insured was totally disabled within the meaning of the disability clause of policy, the circuit court of appeals erred in failing to follow the two decisions of the Kansas City

Court of Appeals in earlier suits between the same parties involving the same issues of law and fact. "We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts under the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently."

Blair v. *Commissioner of Internal Revenue,* 300 U. S. 5, 9-10, 81 L. ed. 465, 57 S. Ct. 330:—Decision by appellate court of Illinois that the trust created by will of William Blair was not a spendthrift trust and that interest of beneficiary was assignable, held binding on federal court in suit between beneficiary and commissioner of internal revenue to determine whether income was taxable to beneficiary despite the assignment.

Security First National Bank v. *United States,* 9 Cir., 103 F. 2d 188, 190:—Action by United States to recover money collected by defendant bank on checks issued to deceased veteran as payee, delivered to imposter and by him endorsed and cashed. The federal district court entered a judgment in favor of the United States, on the ground that the endorsement of the name of payee on the check was forged. This judgment was reversed as contrary to the conclusion reached in an analogous case by an intermediate appellate court of California in *Ryan* v. *Bank of Italy,* 106 Cal. App. 690.

Yoder v. *Nu-Enamel Corp.,* 8 Cir., 117 F. 2d 488, 489:—"In the application of a state statute the federal courts are, of course, bound by the construction made by the courts of the state. * * * And the obligation to accept local interpretation extends not merely to definitive decisions, but

to considered *dicta* as well. *Hawks* v. *Hamill,* 288 U. S. 52; *Badger* v. *Hoidale,* 8 Cir., 88 F. 2d 208. Indeed, under the implications of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court in dealing with matters of either common law or statute to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed."

Cold Metal Process Co. v. *McLouth Steel Corp.,* 6 Cir., 126 F. 2d 185, 188:—After referring to the decision of the Supreme Court of Michigan in *Shevin* v. *Venderbush Company,* 280 Mich. 499, the court said: "No other Michigan case throwing light on the question at issue has been cited by counsel and no available data deciding precisely what the state law is as applied to the case at bar has been called to our attention and we have found none. *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223. Our problem becomes more difficult by reason of the fact that there is no controlling reported decision from the state court of Michigan, but under such circumstances it is our duty to solve the question by resort to any persuasive data that is available, such as justifiable inferences or fair implications from other related adjudications and by reference to and application of the rule laid down in the case of *Shevin* v. *Venderbush Company, supra.*"

Gustin v. *Sun Life Assurance Co. of Canada*, 6 Cir., 152 F. 2d 447, 451:—In action by administrator to recover on policy issued on life of decedent, the question whether the policy was in force at time of death turned on the proper computation of interest on policy loans. If the loans were subject to compound interest, as contended by the insurer, the plaintiff was not entitled to recover. The district court found for the defendant and on the appeal the judgment was affirmed. The circuit court of appeals was of the opinion that the insurer had no right to compound interest, also that this conclusion was in accord with the general principles of insurance law applied in Ohio, the place of the contract. However, a contrary result was reached in the unreported decision of the court of appeals of Cuyahoga County of Ohio in *Johnson* v. *Penn Mutual Life Insurance Co.*, in which the Supreme Court of Ohio denied a motion to certify the record and dismissed an appeal filed as of right. The circuit court of appeals said: "Under the principles declared in *West* v. *American Telephone Co.*, 311 U. S. 223, this decision of the inferior state court is binding upon the federal court. If it squarely determines the controlling question in the instant case, we follow it regardless of the logic of the considerations heretofore expressed. * * * The case is squarely in point as to the material facts. We think that the Johnson decision runs counter to the spirit and general reasoning of the decisions of the Supreme Court of Ohio above cited; but in view of its ruling made on October 4, 1939, not disapproving the conclusion of the court of appeals upon the identical question presented here, we conclude that 'there is no convincing evidence that the law of the state is otherwise' than as declared in the Johnson case. *Six Companies of California* v. *Joint Highway District No.* 13, 311 U. S. 180. It cannot

be stated with assurance that the Supreme Court of Ohio will not follow the doctrine of the Johnson case in the future, and this fact compels affirmance of the judgment.

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223.

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169.

Meredith v. *City of Winter Haven*, 320 U. S. 228."

B.

The Illinois cases consistently hold that the language of an insurance policy seeking to limit the liability of an insurer is to be strictly construed against the insurance company, and that unless plainly necessary from the language of the policy a construction should not be adopted which defeats the claim to indemnity.

Travelers' Insurance Co. v. *Dunlap*, 160 Ill. 642, 646, 43 N.E. 765, 766.

Metropolitan Accident Association v. *Froiland*, 161 Ill. 30, 37, 43 N.E. 766, 768.

Terwilliger v. *National Masonic Accident Association*, 197 Ill. 9, 12-13, 63 N.E. 1034, 1035.

Travelers' Insurance Co. v. *Ayers*, 217 Ill. 390, 393, 75 N.E. 506, 507.

Central Accident Insurance Co. v. *Rembe*, 220 Ill. 151, 160, 77 N. E. 123, 125.

Higgins v. *Midland Casualty Co.*, 281 Ill. 431, 439, 118 N.E. 11, 14.

Ziolkowski v. *Continental Casualty Co.*, 365 Ill. 594, 603, 7 N.E. 2d 451, 456.

Miner v. *New Amsterdam Casualty Co.*, 220 Ill. App. 74, 77; cert. den. by Supreme Ct. of Ill., 220 Ill. App. xiii.

Vollrath v. *Central Life Insurance Co.*, 243 Ill., App. 181, 185; cert. den. by Supreme Ct. of Ill., 243 Ill. App. xvi.

Porter v. *Continental Casualty Co.*, 277 Ill. App. 492, 502.

To illustrate how said rule of strict construction has been applied by the Illinois courts, we indicate briefly the holdings of the above-cited cases:

Travelers' Insurance Co. v. *Dunlap*, 160 Ill. 642:—Policy of accident insurance provided that the insurance did not cover death resulting, wholly or partly, directly or indirectly, from "taking poison." Insured mistook a bottle of carbolic acid for peppermint, poured the acid into a glass of water and drank it, resulting in his death. *Held*: that the exclusion clause of the policy applied only to the voluntary or intentional taking of poison and did not include accidental poisoning.

Metropolitan Accident Association v. *Froiland*, 161 Ill. 30:—Insured agreed in his written application for benefit certificate that the insurance "shall not be held to extend * * * to poison in any way taken, administered, absorbed or inhaled." The certificate stated that the insurance did not extend to death happening, directly or indirectly, in consequence of "taking of poison or contact with poisonous substances." Insured accidentally took poison instead of distilled water and died from the effect of the poison. *Held*: that the exclusion clause of the policy did not apply to the involuntary act of the insured and that the insurer was liable for the death indemnity.

Terwilliger v. *National Masonic Accident Association*, 197 Ill. 9:—Exclusion of coverage for injury or death resulting from "entering, leaving, or attempting to enter or leave a moving conveyance using steam or electricity as motive power" *held* not to debar lia-

bility for death caused when insured made effort to board a car of a standing train and continued his attempt to enter car after train had started.

Travelers' Insurance Co. v. *Ayers,* 217 Ill. 390:— Exclusion of coverage for death resulting, "wholly or partly, directly or indirectly, * * * from any gas or vapor" *held* not to relieve insurer of liability for death caused by accidental and involuntary inhaling of gas.

Central Accident Insurance Co. v. *Rembe,* 220 Ill. 151:—Exclusion of liability for death resulting from the "taking of poison or contact with poisonous substance," *held* not to extend to blood poisoning of physician who was preparing medicine for a syphilitic patient and while removing cork from bottle accidentally broke neck of bottle and cut finger thereby giving opportunity to poisonous germs to enter blood stream. Even if the germs were "poisonous substance" within the meaning of the exclusion clause, the germs would have produced no injurious effect but for the accidental wounding of the finger.

Higgins v. *Midland Casualty Co.,* 281 Ill. 431:— Sunstroke suffered while insured was performing his duties as traffic policeman *held* to have been caused by "accidental means."

Ziolkowski v. *Continental Casualty Co.,* 365 Ill. 594, also *Porter* v. *Continental Casualty Co.,* 277 Ill. App. 492:—Exclusion of indemnity for *injury* resulting from intentional act of insured or any other person held not to exclude liability for *death* by unprovoked assault and stabbing.

Miner v. *New Amsterdam Casualty Co.,* 220 Ill. App. 74:—Policy provided indemnity for injury or death "not caused or contributed to by illness or disease." While on train, insured became sick to the stomach from eating salted peanuts and went on platform of the car in which he was riding and then somehow fell under the train, resulting in loss of limbs and death

four days later. *Held*: that the illness or disease mentioned in the limitation clause of the policy did not mean every momentary indisposition suffered by the insured, but meant a sickness of some seriousness and permanency which in itself directly contributed to the loss suffered; that the temporary sickness which insured suffered from eating salted peanuts may have been the occasion for his going out of the car and onto the platform but was not a contributing cause of his injury.

Vollrath v. *Central Life Insurance Co.*, 243 Ill. App. 181:—Death caused by paralysis of respiratory organs due to proper and usual administration of ether held due to "accidental means."

* * * * * *

There can be no doubt that on the logic of the foregoing cases the Illinois courts would hold that the death of Captain Hooker did not result from "war" or "act incident thereto," but would have reached the conclusion stated by Minton, *C.J.*, in his dissenting opinion; namely, that practice maneuvers do not constitute war, and that acts in course of such maneuvers like the dash made by Captain Hooker to 'escape' from the platoon escorting him as a 'prisoner' and his jump over the fence and hedge concealing a cliff, do not constitute an act incident to war.

C.

Mattes v. Merchants Reserve Life Insurance Co., 221 Ill. App. 648; cert. den. by Supreme Ct. of Illinois, 221 Ill. App. xxix.*

The decision in the *Mattes* case, we submit, is convincing evidence that the Illinois courts would hold the insurer

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* Opinion set forth in appendix, *infra*, p. 23.

liable for the double indemnity on the provisions of the policy here involved and the facts of the present case. In the application for the *Mattes* insurance, the insured agreed that "if at any time hereafter I shall engage in the military or naval service in time of war, without the written consent of the company, the policy hereby applied for shall thereupon become null and void." The insured was a commissioned officer in the National Guard and was called into active duty during time of war and assigned to service at Camp Logan in Texas. "While in performance of his duty as such commissioned officer, he met his death while attempting to quell a riot." As further stated by the court: "The stipulation shows that the insured met his death while he was attempting to surpress a riot engaged in between mutinous colored troops and white civilians. While deceased's action was, we assume, in some way connected with his military service, it cannot be said that it was a necessary result thereof. He appears to have met his death while in performance of police duty in quelling a civic riot. * * * The incidents which led to the death of the insured, that is, the riot between mutinous troops and civilians, were in no sense, so far as the stipulation shows, inseparably connected with the fact that this nation was at war with Germany. * * * Clearly it cannot be held in the present case that deceased came to his death while engaged in a war service, construing the clause in question more strictly against the insurer."

The conclusion reached by the circuit court of appeals, we submit, is absolutely incompatable with the decision of the Illinois court in the *Mattes* case. In the present case the insurer was forced to concede that the double indemnity clause of the policy did not exclude death while enrolled in military service, even in time of war, unless the death

resulted from war or an act incident thereto. The majority opinion of the circuit court of appeals—despite the respondent's own disavowal of so loose a construction of the war exclusion clause—debars from the double indemnity coverage death occuring while the insured is "in the war," engaged in the performance of the military duties to which he is assigned, including training. (R. 100.) Thus, the test laid down by the court is the *status* of the insured at the time of the accident which results in death, rather than *the nature or circumstances of the accident itself.*

It is said in the opinion of the circuit court of appeals that millions of men rendered military service in the war both at home and abroad who did not reach the ultimate goal of combat service; that these men, some of whom sustained injuries during the course of their training, would be astounded and shocked if informed that they were not "in the war," or "engaged in war," and their injuries were not sustained "as a result thereof." (R. 100-101.) This statement—the crux of the majority opinion— ignores entirely the *nature and circumstances of the injury,* and deals only with the *status* of the injured person at the time of the occurrence, that is, his relationship at that time to the war organization and the war program.

To adopt the criticism of the majority opinion made by Minton, *C.J.*:

> "I do not think that death resulted in the instant case directly or indirectly 'from war or any act incident thereto.' I think that the insured met his death as an incident of training for war. It would have been simple enough for the defendant to have added to the limiting clause or an act incident to training for war. This it did not do. The majority very obligingly supplies it for the defendant, thus expanding the exclusion

provision by construction to cover everyone in service who is engaged in training.

"When our country is at war, we are all in the war in a broad sense; but we are not all in service. One who has not completed his training can hardly be said to be engaged in war or any incident thereof. Certainly an incident of training for war is not the same thing as an incident of war. The provision of the policy should not be construed to include as incidents of war what are only incidents of training for war, unless we are prepared to say all acts incident to training for war are also incident to war. Such a liberal construction of the policy is unwarranted." (R. 102.)

The Illinois court,, in the *Mattes* case, followed *Kelly* v. *Fidelity Mutual Life Insurance Co.*, 169 Wis. 274, 172 N.W. 152, *Redd* v. *American Central Life Insurance Co.*, 200 Mo. App. 383, 207 S. W. 74, and *Malone* v. *State Life Insurance Co.*, 202 Mo. App. 499, 213 S.W. 877. In each of these cases the policy of insurance excluded coverage while the insured was engaged in military or naval service and in each case the insured came to his death while 'on duty' in military service during time of war, yet recovery of the insurance was allowed because the death was held not to have resulted from participation in distinctively military activities.

Captain Hooker, at the time of the accident which caused his death, was not engaged in war activity and, was not subject to war hazards. Indeed, the hazard which brought sudden death to Captain Hooker, the act of running away from his pretended guards and jumping over a hedge in hilly terrain, was more characteristic of an athletic contest than of actual warfare.

The existence of a state of war, in which Captain Hooker was doing his part, added not an iota to the dangers of the

practice maneuvers in which he was participating. The training ground was two to three thousand miles away from the nearest points of actual engagement with the enemy. Captain Hooker might well have engaged in exactly the same kind of training in similar terrain in the United States or elsewhere, immediately after the insurance policy was issued in 1938, more than three and a half years before the United States was at war, since he was then already a reservist in the United States Marine Corps. It is true, of course, that 'but for' the war he might never have gone to New Zealand to continue his military training. The existence of war, however, did not transmute the training maneuvers into actual war activity or convert the stunt of running away from an escorting patrol into an act incident to war. No act of warfare, on his own part or on the part of the enemy, killed Captain Hooker. His death resulted from an accident not in the least of distinctively war nature, a chance fall over a cliff because of obstructed view and slippery ground, and such fall was not in turn caused by war operations, nor by a specific act incidental to warfare.

In contrast with the decision of the Circuit Court of Appeals for the Seventh Circuit in the present case we call attention to the recent decision of the same court in *Bull* v. *Sun Life Insurance Co. of Canada,* 141 F. 2d 456, cert. den. 323 U. S. 723. The insurance on the life of Lt. Bull excluded the risk of travel in aircraft. The insured was commanding officer of a seaplane downed in combat with Japanese fighting planes. He was killed after the seaplane had landed in a disabled condition and was strafed by machine gun fire from the Japanese planes. The circuit court of appeals affirmed the judgment of the district court in favor of the plaintiff beneficiary. In har-

mony with the Illinois rule of strict construction of the exclusion clause, it was held that since flight of the airplane had definitely ended, the death of the insured did not result from a risk of aviation, even though the insured was engaged generally in the military aviation service. While insured's participation in aviation was the *occasion* for his presence on the crippled seaplane, the *cause* of his death was the gunfire from the enemy planes.

In the *Bull* case the prevailing opinion of the court was written by Minton, *C. J.*, with Kerner. *C. J.*, who did not sit in the present case, concurring. Judge Major, author of the prevailing opinion in the present case, dissented in the *Bull* case.

Reverting to the decision of the Appellate Court of Illinois in the *Mattes* case, whereas the decisions of the appellate courts of Illinois were formerly declared to be the law only in the case decided (Law 1877, p. 69, sec. 17), this limitation was removed from the Illinois Courts Act in 1935 (amendment April 25, 1935, Laws 1935, p. 696, sec. 1; Ill. Rev. Stats. 1945, ch. 37, sec. 41) and the decisions of these courts may now be regarded as declaratory of the law of the state and binding upon all inferior courts in the state. (*Hughes* v. *Medendorp,* 294 Ill. App. 424, 13 N. E. 2d 1015.)

Conclusion.

The judgment of the district court was in harmony with Illinois law, although the district judge was not aided by reference to the *Mattes* case, discovered later through citation in *Barnett* v. *Merchants Life Insurance Co. of Des Moines,* 87 Okl. 42, 208 P. 271, 274.

If this court agrees that the decision of the circuit court

of appeals does not truly reflect the law of Illinois, it is of national importance that the jurisdiction of this court be exercised to review and revise this decision, and thereby again insist upon strict adherence by all the federal courts to the doctrine of *Erie Railroad Co.* v. *Tompkins.*

Respectfully submitted,

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Appendix.

Caroline C. Mattes v. Merchants Reserve Life Insurance Company, Appellate Court of Illinois, First District, Gen. No. 26384 (reported in abstract form, 211 Ill. App. 648).*

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court entered in favor of the plaintiff and against the defendant.

In the Municipal court the plaintiff sought to recover a judgment on two insurance policies in the defendant company for the sum of $2000 each. These policies were known at the trial as #4 and #1370 respectively. At the conclusion of all the evidence the court, on motion of the defendant, excluded all evidence relating to policy #4 and directed a verdict on policy #1370 in favor of the plaintiff. Only the action of the court in entering a judgment on the latter policy is questioned here. The evidence shows that the application for the insurance provided by policy #1370 contained a stipulation as follows:

> "* * * If at any time hereafter I shall engage in the military or naval service in time of war, without the written consent of the company, the policy hereby applied for shall thereupon become null and void."

It was stipulated on the trial that the insured at the time the policies were issued was a commissioned officer in the National Guard of Illinois; that about the 12th of August, 1917, he arrived with a detail of his regiment at Camp Logan, near Houston, Texas, and thereafter on August 23, 1917, and while in the performance of his duty as such commissioned officer, he met his death while attempting to quell a riot.

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*Certiorari denied by Supreme Court of Illinois, 221 Ill. App. xxix.

It is conceded that all of the premiums due on the said policy had been paid to the extent that the policy was continued in force until October 1, 1917. The by-laws of the defendant company provide that its policies shall become null and void if a member engage in military or naval service in time of war. At the time the insured met his death this country was at war with the Imperial German Government. Plaintiff's position on the trial and here is that the defendant waived the provision of the by-laws and the application above quoted.

It is also insisted for the plaintiff that the clause against military service was and is void as against public policy; that it does not apply where the entry into the military service was involuntary; that the insured's death was caused by hazard common to both military and civil life and did not occur by reason of his military service.

It appears from the evidence that the death of insured was caused while he was actively engaged in military service for the United States Government. The clause in question was inserted in the policy by the insurer for its benefit, and should therefore be construed more strictly against it.

The case of *Kelly* v. *Fidelity Mutual Life Ins. Co.*, 169 Wis. 274, is in some respects like the present case. In that case the Supreme court said:

> "We think it is clear that the language was used for the purpose of limiting the liability to the return of the premiums in cases where death resulted directly or indirectly from some cause peculiar to the military service and one not common to military service and civilian life. The deceased came to his death by reason of an accident while riding a motor cycle under circumstances which were not in any way peculiar to the military service."

The stipulation shows that the insured met his death while he was attempting to suppress a riot engaged in between mutinous colored troops and white civilans. While deceased's action was, we assume, in some way connected with his military service, it cannot be said that it was a necessary result thereof. He appears to have met his death while in the performance of police duty in quelling a civic riot. It is not asserted that the death of deceased was brought about by a cause necessarily the result of his being drafted into the federal military service, nor was it caused by the war then pending between the United States Government and the Imperial German Government. The incidents which led to the death of insured, that is, the riot between mutinous troops and civilians, were in no sense, so far as the stipulation shows, inseparably connected with the fact that this nation was at war with Germany.

The case of *Redd* v. *American Central Life Ins. Co.*, 200 Mo. App. 383, is essentially similar to the present case. The only substantial difference being that in that case the application for the policy contained a clause which provided that active service in the army or navy without the written consent of the company would invalidate the policy in part. The insured died while in service at Camp Funston, Kansas. In deciding the case the court said:

> "The kind of active service that we are dealing with is, according to the policy, service 'in time of war.' Is one who has entered a military training camp and is there in the course of training in the medical department of the army, thousands of miles from the scene of hostilities, to be regarded as in active service in the army in time of war? We think not. Such a person is certainly not 'before an enemy in time of war,' or engaged in 'operations carried on in his

presence,' nor is he in 'the performance of duty against an enemy.'

"The policy provides that in order that defendant may not be liable for the full value of the policy, death must be from service in war. This provision taken in connection with that in the application shows that the application and policy mean that the service mentioned was to be in operations by which war is carried on before the enemy; that is, the service one renders when engaged or assisting in actual hositilities."

Clearly it cannot be held in the present case that deceased came to his death while engaged in a war service, construing the clause in question more strictly against the insurer. *Phenix Insurance Co.* v. *Grove,* 215 Ill. 299.

It does not seem reasonable to hold that the clause was intended to protect the defendant company from loss due to hazards ordinarily disconnected with war service. The stipulation shows that the officers and directors of the defendant company had full knowledge of deceased's connection with the National Guard of Illinois. The clause in question does not provide for rendering a policy null and void merely because an insured may become engaged in military service, but it expressly provides that such result is not to be brought about unless the insured becomes so engaged in time of war.

It is our opinion that in a case where it is shown that the insured with full knowledge on the part of the defendant was at the time the policy was issued and for a considerable time thereafter engaged in military service, the clause should be held to mean that the death, before action on the policy could be defeated, should be shown to have been brought about in some manner as a result of an existing war. An act of Congress approved June 3, 1916, known as the National Defense Act, provides for placing the Na-

tional Guard troops under federal, as well as state control. Under this act the insured took oath in November, 1916, to "well and faithfully discharge the duties of the office in the National Guard of the United States and of the State of Illinois."

Mr. Saunders, a witness for plaintiff, was at this time a director and secretary of the defendant company, and his testimony discloses that he knew the defendant for twenty years or more; that both he, the witness, and Mr. Pierce, who during 1916 and 1917 was a director and treasurer of the defendant company, were well aware of deceased's connection with the military service; and this same witness, Mr. Saunders, testified as to facts from which it would not be unreasonable to conclude that this knowledge was known to the witness and to Mr. Pierce after insured had been drafted into the service of the Federal government in July, 1917.

On the whole record we think the judgment ought to be affirmed. The decided cases are not quite clear as to what acts or knowledge constitute a waiver of a provision which requires consent in writing before an insured may become connected with military service in time of war. *Phenix Insurance Company* v. *Grove,* 215 Ill. 299. We prefer, however, to rest our decision upon our belief that the clause under consideration was drafted by the defendant company for its own benefit and that when applied to the facts of the present case, in view of the admitted knowledge on the part of defendant's officers, it should be held that it was intended thereby to protect defendant from loss in the event of insured's death arising out of circumstances connected with the carrying on of war; that deceased's death is not shown by the stipulation or otherwise to have been caused by any act or fact necessarily connected with

the world war, and that it is not shown by the record that his death was not the result of accidental causes existing independent of his employment in the service of the United States. *Malone* v. *State Life Ins. Co.*, 202 Mo. App. 499.

The judgment of the Municipal court will be affirmed.

Affirmed.

HOLDOM, P. J., AND MCSURELY, J., CONCUR.